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VIA EMAIL (CEQA.Guidelines@resources.ca.gov)

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Dear Mr. Calfee:

Thank you for the opportunity to comment on OPR's Proposed Updates to the CEQA Guidelines (Proposed Updates). CSLC staff appreciates OPR's efforts to engage the public and stakeholders to improve the efficiency, clarity, and relevance of the Guidelines, and in this spirit of collaboration we make the following comments on the Proposed Updates. The comments are listed in roughly the same topical order as the Proposed Updates.

Technical note: in the suggested edits listed below, OPR's revisions are treated as accepted and are shown in plain type. CSLC's suggested additions are shown in **bold underlined** type and deletions are shown in bold **~~strikethrough~~**. The only exceptions to this are in our comments on Geology and Soils and on Mineral Resources, where we suggest retaining the existing categories, but with certain textual edits.

Using the Existing Facilities Exemption

CSLC staff supports OPR's proposal to amend section 15301 to facilitate state policy goals of promoting infill development. However, staff observes that the revision as written is ambiguous in that it could be read as limiting the lead agency's consideration to historic use and precluding consideration of existing conditions. Staff suggests the following clarifying edits to the revision (Proposed Updates, p. 34):

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of **use beyond that existing at the time of**

the lead agency's determination, or negligible or no expansion of historic use provided such historic conditions are supported by substantial evidence. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing **or documented historical** use.

Updating the Environmental Checklist (Appendix G)

1. Biological Resources:

- a. CSLC staff suggests updating references to the California Department of Fish and Game to the agency's new name, the California Department of Fish and Wildlife. (Proposed Updates, p. 54.)

- b. Nonindigenous/Invasive Species:

The CSLC is charged with preventing or minimizing the introduction of nonindigenous species to California waters by regulating marine vessel ballast water and biofouling. Like the California Invasive Species Council, CSLC staff believes that lead agencies would benefit from specific reference to nonindigenous/invasive species prevention in Appendix G.

One way to accomplish this could be to add the following language to Question IV (d) (Proposed Updates, p. 54):

d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, ~~or~~ impede the use of native wildlife nursery sites, **or introduce or increase nonindigenous or invasive species?**

2. Cultural Resources: Paleontological Resources

CSLC staff observes that moving consideration of paleontological resources into the new Open Space category is inappropriate because such resources are not only found in open space, but may also be located under existing buildings and other development. We recommend that the existing question ("Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?") be retained and moved to the Geology and Soils category.

3. Geology and Soils

CSLC staff supports OPR's proposal to streamline and eliminate redundancy in the Appendix G Geology category; however we think that OPR's proposal to eliminate Geology as an independent category is inadvisable. This is because explaining potential geological environmental impacts for decisionmakers and the public typically requires discussion of seismicity, geotechnical concepts, and other technical issues better suited to an independent section or chapter in an environmental document rather than blending with other topics.

OPR proposes to move Geology-related questions to two separate categories: Hazards (Question VIII (h), p. 58) and Open Space, Managed Resources and Working Landscapes (Question XI (d)(iii), p. 65). This could result in practical difficulties in organizing CEQA documents. Given that many lead agencies use Appendix G as an outline for EIRs and other CEQA documents, dividing Appendix G questions on Geology issues into two separate categories could result in redundant discussions and/or difficult-to-track cross-references between chapters in environmental documents. Therefore, CSLC staff recommends retaining all Geology-related questions in a dedicated Geology category. Additionally, if the Geology category is retained, it will provide an appropriate location for the question on unique paleontological resources and geologic features, now that the question is slated to be moved from the Cultural Resources category.

CSLC staff proposes the following edits to the Geology and Soils category aimed at reducing redundancy while still retaining the most useful analytical aspects of the category.

GEOLOGY AND SOILS -- Would the project:

- a) Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:
 - i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.
 - ii) Strong seismic ground shaking?

iii) on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?~~Seismic-related ground failure, including liquefaction?~~

iv) ~~Landslides?~~

b) Result in substantial soil erosion or the loss of topsoil?

c) Be located on ~~a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?~~

d) ~~Be located on~~ expansive soil, as defined in ~~Table 18-1-B of~~ the Uniform Building Code (~~1994~~), creating substantial risks to life or property?

d) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?~~Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water?~~

4. Land Use and Planning

Regarding OPR's proposed change to Land Use and Planning Question (b) (Proposed Updates, p. 61), CSLC staff observes that listing various types of land use plans helps local lead agencies identify and think about the broad range of plans and policies that should be considered during CEQA analysis. Therefore, staff suggests the following edit to OPR's revision to retain some of the question's existing language:

b) Cause a significant environmental impact due to a conflict with any land use plan, policy, or regulation (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?

5. Mineral Resources

Pursuant to the Public Resources Code, the CSLC is the agency charged with management and oversight of existing oil and gas leases on state lands that generate considerable income for the State of California. The CSLC is also responsible for management and leasing of mineral resources on state lands, including hard rock and geothermal resources. Much of the state's mineral ownership remains in a split-estate reserved mineral interest that underlies surface area sold to private parties over the last 155 years. Where mineral reservations are retained by the state, state law authorizes surface access for mineral prospecting and leasing (after proper CEQA compliance) even where the surface owner has developed the land. Consideration of a project's significant impacts to Mineral Resources requires consideration of a project's effect to resource availability and recovery and also requires lead agencies to consider project compatibility with the existence of adjacent resources.

The Proposed Updates would eliminate Mineral Resources as a separate Appendix G category and consolidate Appendix G questions on mineral resources into a single question in the new Open Space category: whether the project would "Adversely impact open space used for production of resources by, among other things: . . . causing the loss of availability of a known mineral resource." (Question XI (a)(ix), pp. 63-64.)

CSLC staff is highly concerned about the elimination of Mineral Resources as a separate Appendix G category and urge OPR to maintain this topic as an independent category. The consolidation of mineral resource considerations into a single question in the Open Space category could dilute environmental analysis of mineral resource impacts and inadvertently result in lead agencies glossing over mineral resources issues, potentially resulting in significant natural resource loss and economic impacts to the state. Maintaining Mineral Resources as a discrete, separate category requires agencies to fully consider appropriate and consistent land uses relative to the existence of a nearby mineral resource.

Additionally, CSLC staff proposes revising the Mineral Resources category questions to clarify that "causing the loss of availability" means preventing or obstructing access to the resource. Recent CEQA litigation has occurred in which plaintiffs argued that mining lease renewal projects cause the loss of availability of a resource through mining activity itself. CSLC staff suggests that rewording the Mineral Resources question could help prevent future litigation along the same lines by clarifying the question's meaning.

To address the concerns detailed above, CSLC staff suggests that the Mineral Resources category appear in Appendix G as follows:

MINERAL RESOURCES -- Would
the project:

a) **Result in Cause** the loss of availability of a known mineral resource ~~that would be~~ of value to the region and the residents of the state? **“Loss of availability” means preventing or impeding access to the resource, for example through incompatible development of a land use over or adjacent to a mineral resource deposit.**

b) **Result in Cause** the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan? **“Loss of availability” means preventing or impeding access to the resource, for example through incompatible development of a land use over or adjacent to a mineral resource deposit.**

6. Open Space, Managed Resources and Working Landscapes

a. Open Space for Preservation of Natural Resources:

The Proposed Updates include, under “a)”, the language “adversely impact open space for the preservation of natural resources...” and goes on to list a number of examples of what this means. (Proposed Updates, p. 63.) CSLC staff is concerned that the use of the phrase “open space for the preservation of” is unintentionally overbroad and confusing. We add that the word “preservation” has certain connotations in practice, and the meaning should be clarified as to whether this means that the area has a formal designation or has been in some way officially designated for the purpose of “preservation” or if the term is potentially limitless. Does OPR instead mean “used by” or “important for”? For example, CSLC considers projects under its jurisdiction which are mostly in the marine and

riverine environment. If the question were read broadly, would CSLC have to consider every project affecting the ocean or river in any way to have significant impacts, since the question asks “adversely impact open space for the preservation of natural resources including, but not limited to...waters of the State...?” In other words, one could argue that the ocean itself is “open space” that exists for the purpose of “preservation of natural resources” and that any project affecting the ocean would have potentially significant effects.

There are a number of ways this question could be refocused, but as a starting point, CSLC staff suggests the following (Proposed Updates, p. 63.):

Would the project adversely affect open spaces containing **sensitive** natural resources and working landscapes? Considerations may include, among others, whether the project would:

a) **Have a substantial adverse effect on Adversely impact open space for** the preservation of **sensitive** natural resources, including, but not limited to:

(i) habitat **officially designated by the state or federal government** **required** for the preservation of fish and wildlife species, including habitat corridors **or**;

(ii) waters of the state, **where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies, including but not limited to marine protected areas, national marine sanctuaries, national seashores, state parks, national parks, national**

**monuments, and ecological
reserves.** ~~or~~

**~~(iii) unique paleontological
resource or site or unique
geologic feature?~~**

Please note that (a)(iii) is deleted per our comments earlier in this letter about paleontological resources.

b. Marine Protected Areas:

The CSLC manages the state's tidelands and submerged lands, some of which have been designated as Marine Protected Areas (MPAs) through the Marine Life Protection Act. CSLC staff participates on the MPA Statewide Leadership Team, which is coordinated by staff at the Ocean Protection Council (OPC). The Leadership Team has worked collaboratively for many months on a three-year MPA implementation Work Plan which includes, among other things, strategic priorities and key actions in the area of MPA-related policy and permitting. One of the key actions in this area is to encourage consideration of impacts to MPAs and MPA resources in the CEQA Guidelines update. At its meeting on September 22, 2015, the OPC unanimously endorsed the Work Plan. Consistent with this strategic priority and key action, and to prevent potential impacts to MPAs from being overlooked in environmental analyses, CSLC staff suggests the following addition to Biological Resources, Question IV (f) (Proposed Updates, pp. 54-55):

f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, **established state Marine Protected Area,** or other approved local, regional, or state habitat conservation plan?

Additionally or alternately, CSLC also suggests that MPAs be added to Land Use and Planning Question (b) (Proposed Updates, p. 61) as follows:

b) Cause a significant environmental impact due to a conflict with any land use plan,

policy, or **regulation (including, but not limited to a general plan, specific plan, local coastal program, Marine Protected Area, or zoning ordinance)** adopted for the purpose of avoiding or mitigating an environmental effect?

c. **Agricultural Zoning Conflicts**

Regarding new Question XI (b), CSLC staff observes that the new language addressing agricultural uses does cover direct changes to agricultural zoning, but fails to capture potential conflicts arising from incompatibility with existing agricultural zoning. This is a critical distinction, because the development of incompatible land uses near farmland can result in litigation and exacerbate pressures on existing farms, for example by introducing new neighbors who object to typical agricultural odors, noises, or practices. Therefore, CSLC staff suggests the following edit to Question XI (b)(iii) (Proposed Updates, p. 63):

(iii) conflicting with **existing zoning for agricultural use**
or a Williamson Act
contract;

d. **Recreation:**

Regarding new Question XI (c), CSLC staff requests the addition of the following, in order to reflect consideration of impacts to recreational users of a project area (e.g., preclusion of boating/recreating due to a bridge replacement project that needs to exclude recreators from the project area for safety reasons) (Proposed Updates, p. 64):

(c) Adversely affect open spaces used for outdoor recreation, including parks, trails, and similar resources through **temporary or permanent loss of access to or use of recreational areas**
or conversion to non-recreational uses or by increasing demand to a degree that substantial physical deterioration

would occur?

e. Transportation:

CSLC staff recognize that Transportation-related revisions in pages 67-68 of the Proposed Updates are placeholders while OPR continues outreach to implement SB 743. At the same time, staff would like to suggest that water-based transportation be included in updates to this Appendix G category. For example, CSLC suggests the following edit to OPR's placeholder Transportation Question (a):

a) Conflict with a plan,
ordinance or policy addressing the
safety or performance of the circulation
system, including transit, roadways,
bicycle lanes, ~~and~~ pedestrian paths,
and ferry and shipping lanes?

Remedies and Remand: Proposed Section 15234

CSLC staff supports OPR's effort to restate and clarify CEQA case law principles and to inform the public and project proponents of relevant statutory and case law. However, staff is concerned that subdivision (a) of proposed section 15234 could be subject to challenge. OPR cites Public Resources Code section 21083 as authority for the regulation, but that provision empowers OPR to "prepare and develop proposed guidelines for the implementation of this division by public agencies," not the courts. The language of subdivision (a) could arguably be interpreted as an attempt to regulate court decisions in CEQA cases, rather than simply restating CEQA case law to provide context for subdivisions (b) through (d). Therefore, CSLC staff suggests the following clarifying revisions to subdivision (a) (Proposed Updates, p. 74):

New Section 15234. Remand

(a) Not every violation of CEQA is prejudicial requiring rescission of project approvals. Courts may fashion equitable remedies in CEQA litigation. **Pursuant to Public Resources Code section 21168.9,** if a court determines that a public agency has not complied with CEQA, and that noncompliance was a prejudicial abuse of discretion, ~~the court shall~~ **the Legislature requires the court to** issue a peremptory writ of mandate requiring the agency to:

(1) void the project approval, in whole or in part;

(2) suspend any or all project activities that could result in an adverse change or alteration to the physical environment or preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or

(3) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA.

Analysis of Energy Impacts – Question for Stakeholders

At page 78 of the Proposed Updates, OPR asks stakeholders whether the Guidelines should define the phrase “wasteful, inefficient, and unnecessary consumption of energy.” CSLC staff does not have a recommendation either way, except that if the phrase is defined, any definition should take into account the rapid pace of technological change in energy efficiency. For example, any definition should not list a given level of fuel or electricity use as meeting the Guidelines, given that technological developments have led, and are expected to lead to, increasingly efficient appliances, buildings, vehicles, and modes of travel.

Water Supply Analysis in CEQA

1. Question for Stakeholders:

At page 84 of the Proposed Updates, OPR asks stakeholders about the location of proposed new provisions on Water Supply Analysis. Because OPR states that the proposed provisions are meant to apply to all project types, but existing section 15155 discusses requirements that apply only to certain types of projects, CSLC staff recommends not placing the new provisions in existing section 15155 in order to avoid confusion.

For similar reasons, staff also recommends the new provisions not be placed in existing section 15126.2 (on the contents of an EIR), because OPR states that the new provisions are meant to apply to all types of environmental documents, not just EIRs.

Instead, CSLC staff suggests that OPR select one of the other two options OPR presented, either adding the new provisions to existing section 15064 (on determining significance), or in a new separate section. A new separate section would fit well either immediately before or after existing sections 15064.4 (Determining the Significance of Impacts from Greenhouse Gas Emissions) and 15065.5 (Determining the Significance of Impacts to Archaeological and Historical Resources). Both of these existing sections, like the proposed new provisions,

involve determinations of significance related to discrete topics that are required to be considered in all types of environmental documents and all types of projects.

2. Subdivision (f):

Regarding proposed new subdivision (f) of existing section 15155, CSLC staff proposes an edit to eliminate use of the somewhat colloquial term “pros and cons.” We recognize that the phrase “pros and cons” was used in *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829. However, making this edit will also foster consistency in the Guidelines. This is because the words “advantage” and “disadvantage” appear several times in the CEQA Statute and Guidelines, whereas the phrase “pros and cons” does not appear at all (see, e.g., Pub. Resources Code § 21083 and Guidelines §§ 15065, 15168, 15169). CSLC staff proposes the following edit (Proposed Updates, p. 87):

(f) The degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan. An analysis of water supply in an environmental document shall include the following:

(1) Sufficient information regarding the project’s proposed water demand and proposed water supplies to permit the lead agency to evaluate the advantages and disadvantages~~pros and cons~~ of supplying the amount of water that the project will need.

Common Sense Exemption

CSLC staff observes that in the CEQA Guidelines, the term “exemption” is used to refer to a situation in which CEQA requirements do not apply to a project, while the term “exception” refers to a situation that renders an exemption inapplicable, so that CEQA requirements do apply. We also observe that *Muzzy Ranch* used the phrase “commonsense exemption,” not “exception.” (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380, 386, 387, 388, 389.) Therefore, we suggest the following revision to OPR’s proposed change to subdivision (b)(3) of section 15061:

(b) A project is exempt from CEQA if:

- (1) The project is exempt by statute (see, e.g. Article 18, commencing with Section 15260).
- (2) The project is exempt pursuant to a categorical exemption (see Article 19, commencing with Section 15300) and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.
- (3) The activity is covered by the general rule common sense **exemption** ~~exception~~ that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.
- (4) The project will be rejected or disapproved by a public agency. (See Section 15270(b)).
- (5) The project is exempt pursuant to the provisions of Article 12.5 of this Chapter.

Posting Notices with the County Clerk

CSLC staff suggests the following edit to clarify OPR's proposed revision of subdivision (a) of section 15082 (Proposed Updates, p. 131):

- (a) Notice of Preparation. Immediately after deciding that an environmental impact report is required for a project, the lead agency shall send a notice of preparation stating that an environmental impact report will be prepared to the Office of Planning and Research and each responsible and trustee agency and **shall file the notice of preparation** with the county clerk of each county in which the project will be located. This notice shall also be sent to every federal agency involved in approving or funding the project. If the United States Department of Defense or any branch of the United States Armed Forces has given the lead agency written notification of the specific boundaries of a low-level flight path, military impact zone, or special use airspace and provided the lead agency with written notification of the military contact office and address for the military service pursuant to subdivision (b) of Section 15190.5, then the lead agency shall include the specified military contact office in the list of organizations and individuals receiving a notice of preparation of an EIR pursuant to this section for projects that meet the criteria set forth in subdivision (c) of Section 15190.5.

Using the Emergency Exemption

1. Subdivision (b) of section 15269:

OPR proposes adding the sentence, "Emergency repairs include those that require a reasonable amount of planning." CSLC staff observes that "a reasonable amount of planning" is a somewhat vague term, and it would be beneficial to either define the phrase and/or provide illustrative examples.

2. Subdivision (c) of section 15269:

CSLC staff suggests the following edit to clarify OPR's proposed revision (Proposed Updates, p. 141):

(c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term; **however, a project is exempt from the requirements of CEQA** ~~but this exclusion does not apply~~ (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility.

Once again, thank you for the opportunity to review and comment on the Proposed Updates. Should you have any questions regarding these comments, please do not hesitate to contact us.

Most sincerely,



Lucinda Calvo
Staff Attorney